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APPENDIX A

NOT FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 08-4089

[Filed July 9, 2009]

SERGE FISENKO,	)
	)
Petitioner,	)
	)
	)
ERIC H. HOLDER, Jr., Attorney General*	)
	)
	)
Respondent.	)
	)

On Petition for Review of an Order of the Board of Immigration Appeals.

OPINION

* Substituted for Michael B. Macaws pursuant to Federal Rule of Appellate Procedure 43(c)(2).

BEFORE: COLE and ROGERS, Circuit Judges; and GRAHAM, Senior District Judge.[**]

GRAHAM, Senior District Judge. Petitioner SERGE Fisenko (Mr. Fisenko) seeks review of a final order of the Board of Immigration Appeals (BIA or Board) adopting and affirming the decision of the Immigration Judge denying Mr. Fisenko's application for asylum and withholding of removal. Mr. Fisenko argues that the BIA erred when it affirmed the Immigration Judge's decision because the Immigration Judge made an unreasonable demand for corroboration and because the Immigration Judge's decision was not supported by substantial evidence. For the following reasons, we DENY the petition for review.

I. BACKGROUND

Mr. Fisenko claims to have suffered persecution on account of his Baptist faith at the hands of the Russian Cossacks and the Russian police. According to various internet articles Mr. Fisenko submitted into the record, Cossack origins have been traced back to the 18th Century. The Cossacks were elite members of society who were eventually incorporated into the hierarchy of the Russian state as scouts, border guards, and mercenaries. Today, Cossack values include "[an unyielding commitment to the country's territorial integrity, a forceful stance against adversaries, and the promotion of traditional values. . . . Russian ethnicity and Orthodoxy are crucial to Cossack identity." Joint Appendix, 151, 153

[**] The Honorable James L. Graham, United States Senior District Judge for the Southern District of Ohio, sitting by designation.

hereinafter "JA" During the hearing before the Immigration Judge, Mr. Fisenko introduced a video called "Death of a Nation." The Immigration Judge stated that this video indicated that Cossacks in some parts of Russia view themselves as protectors of traditional Russia and serve in some parts of Russia as a "parallel police force with armed people in their ranks and under their control." JA 67.

In November 2005, after Mr. Fisenko left for the United States, the State Duma passed a law which officially recognized the recruitment of Russian Cossacks into state service in police, military and border guard forces. The law confirmed the effective coordination between regional authorities and Cossack organizations. According to one article in the record, in southern Russia, "Cossack paramilitary units have figured prominently in violent campaigns to persecute and expel ethnic minorities and illegal immigrants -- often with tacit official approval." JA 157.

Mr. Fisenko was born in Krasnodon, Russia. He was raised as an atheist but later converted to the Baptist faith in 2003. After converting, he discussed his newfound faith with his neighbors and coworkers. People began mocking him for being different and calling him a "secant." Mr. Fisenko bases his claim of past persecution on the following six incidents.

In November 2003, as he was coming home from work, Mr. Fisenko's neighbors began beating him, threatening to kill him, and threatening to slit his throat. He managed to make it safely inside his house and lock the door. Mr. Fisenko did not file a police report after this first incident.

In December 2003 Mr. Fisenko was stopped by three drunk Cossacks on patrol while he was coming home late from an evening worship service. They held him by his clothes and demanded to see his identification, even though they knew who he was. Mr. Fisenko recognized one of the Cossacks as "Ottoman." He tried to escape but the patrolmen held him and started beating him and he fell. Once on the ground, the Cossacks beat him and he lost his orientation. They swore at him, calling him a Baptist and other "bad words." JA 79. The Cossacks then handcuffed him and pushed him into their car. They took him to Cossack headquarters and told him they were going to take him to the police station and tell the police he was not obedient to authorities. They spilled vodka on him. A sober Cossack who was at the headquarters when Mr. Fisenko arrived took Mr. Fisenko to the hospital and told the staff that he had found Mr. Fisenko in this condition on the street. Mr. Fisenko was treated for a brain concussion and kidney hematoma and released.

Mr. Fisenko filed a police report and the police sent him to the forensics department to examine him. According to the police report, the Cossacks had familiarized themselves with a list of wanted criminals prior to beginning their foot patrol that night. When they met Mr. Fisenko in the street and he did not produce identification, they believed that he met the description of one of these wanted criminals. They asked Mr. Fisenko to go to Cossack headquarters, but Mr. Fisenko refused and, assuming he was a wanted criminal, they attempted to capture him and drag him to the Cossack headquarters. Mr. Fisenko tried to flee and the Cossacks subdued him using physical force. According to the report, it was only later after Mr.

Fisenko provided the Cossacks with an alibi for the crime of which he was suspected that the Cossacks let him go and took him to the hospital. The police report concluded that after the investigation no criminal charges should be filed against the Cossacks because Mr. Fisenko's injuries were inflicted due to his resistance of lawful demands and the handcuffs were placed on him for less than two hours and only for transportation to Cossack headquarters.

In February 2004 as Mr. Fisenko was crossing the street, a car stopped, a Cossack got out, hit Mr. Fisenko, and called him a Baptist and "dirty words." JA 80. The man then got back into his car and drove away. Again, Mr. Fisenko filed a police report and the police sent him to the forensics department for examination. The police report indicates there was one witness to the assault. The police ran the car model and the partial plate number, but found no cars that matched that registration. The police report indicates that in order to identify the attacker, Mr. Fisenko was shown pictures of Cossacks in the district but he was not able to identify anyone.

After the February 2004 incident and on an unknown date, two children threw bricks through Mr. Fisenko's front and rear windshields. One of the children was the son of Ottoman, the Cossack from the December 2003 incident involving the three drunk Cossacks. Mr. Fisenko reported this incident to the police and the police investigated. The police report stated that the son of Ottoman admitted that he wanted to create trouble for the "sectarian." JA 405. The police report stated that in accordance with Russian law, the police could not charge the boys because they were not at least 14 years of age. The

police, however, placed the boys on a watch list called the "Department of Crime Prevention of Minors" that identified minors who were prone to committing felonies. JA 405. The police report indicated Mr. Fisenko could seek material damages through a civil action, but Mr. Fisenko declined to do so.

After Mr. Fisenko acquired another car and on an unidentified date, the car was either set or caught on fire while parked outside Mr. Fisenko's property. Mr. Fisenko did not see anyone set fire to his car and does not know who was responsible. He called the police and the fire department and they told him that the "Cossacks said that they [were] going to make sure that all Baptists [were] going to move out of that area." JA 85. The police report stated that the car was a 1974 model and the fire was probably caused by a short circuit of the electrical wiring of the car due to the way the car burned from the inside out. The police based their opinion on the fact that the car was 30 years old, that it lacked circuit breakers, and that halogen lights not intended by the manufacturer were installed in the car. Mr. Fisenko does not believe this explanation because he has experience as a mechanic.

In June 2004 Mr. Fisenko came home to find his dog hanged, the windows to his house broken, and "gasoline set in the house." JA 86. He called the police and they took him to the police station. The police put Mr. Fisenko in a cell and kept him there for two days without food or water. They interrogated him and asked him about his prayer house, where it was located, how many members it had, and whether Mr. Fisenko could identify who was assaulting him. Among the policemen were Cossacks. The police beat Mr. Fisenko and continuously put him under water

saying it was a "Baptismal procedure." JA 87. They told Mr. Fisenko that if he did not move out of the area, he would be hanged like his dog. Mr. Fisenko did not file a police report because it was the police who were assaulting him. Two and a half months after this incident, Mr. Fisenko left for the United States.

Two days before Mr. Fisenko's authorization to remain in the United States ran out, Mr. Fisenko filed an application for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture ("CAT")[1] with the Department of Homeland Security ("DHS"). DHS initiated removal proceedings charging Mr. Fisenko under 8 U.S.C. § 1227(a)(1)(B) as an alien who remained in the United States for a time longer than permitted. On October 24, 2006, Mr. Fisenko testified in support of his application in front of an Immigration Judge.

A. The Immigration Judge's Decision

The Immigration Judge, conducting the proceeding through video conference in Cincinnati, Ohio, denied Mr. Fisenko's application for asylum and withholding of removal. The Immigration Judge found Mr. Fisenko to be a "generally credible witness" whose testimony was "fairly detailed, plausible, largely internally consistent and generally consistent with the asylum application and statement that he filed." J.A. 16. The

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[1] Mr. Fisenko does not argue in his opening brief that he is entitled to relief under the CAT, and therefore this argument is waived.

Immigration Judge nevertheless found Mr. Fisenko did not meet his burden of proving past persecution.

The Immigration Judge found that Mr. Fisenko did not corroborate key parts of his story. Significantly, he did not corroborate his last incident of abuse occurring in June 2004 with statements from his family members in Russia, despite acknowledging that his mother, sister, and grandmother knew about the incident. Further, although he produced evidence from his pastor here in the United States who confirmed he was a practicing Baptist, he did not produce any corroboration for his conversion to the Baptist faith in Russia or his practice of that faith in Russia, despite acknowledging that he still kept in contact with his co-parishioners and fellow Baptists in Russia.

As to the other instances that were corroborated, the Immigration Judge found that they were not undertaken by individuals the government was unable or unwilling to control because the police investigated each time Mr. Fisenko complained and they took their investigation seriously. The Immigration Judge also found that the first five instances were not severe enough to rise to the level of persecution.

The Immigration Judge found Mr. Fisenko failed to meet his burden of showing a well-founded fear of future persecution because although there was evidence in the record that the Cossacks are responsible for some abuses against minority religions, there was also evidence suggesting Baptists in present-day Russia are not persecuted by the government or by any other persons the government is unable or unwilling to control and Mr. Fisenko did not show it would be unreasonable for him to relocate

somewhere in Russia where he could avoid problems and practice his faith.

B. The BIA's Decision

The BIA adopted and affirmed the decision of the Immigration Judge denying relief to Mr. Fisenko. The Board added the following statement: "We agree that under the law of the Sixth Circuit . . . the failure to present evidence corroborating the respondent's conversion and membership in the Baptist church in Russia is sufficient to support the Immigration Judge's finding that the respondent did not meet his burden of proof, even where the respondent's testimony is credible." J.A.1.

II. ANALYSIS

A. Standard of Review

Where the Board adopts and affirms the decision of the immigration judge and provides a supplementary comment, this court reviews "the decision of the [immigration judge] while considering the additional comment made by the [Board]." *See Gilaj v. Gonzales*, 408 F.3d 275, 283 (6th Cir. 2005)(per curium). The United States Supreme Court has held that an immigration judge's determination regarding asylum eligibility must be upheld if "'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)(quoting 8 U.S.C. § 1105a(a)(4))

(repealed and replaced by 8 U.S.C. § 1252(b)(4)(B))).[2] To reverse such a finding, the evidence must "not only support[] [the opposite] conclusion, but compel[] it." *Id.* at n.1 (emphasis omitted). "[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Questions of law are reviewed de novo. *Ali v. Ashcroft*, 366 F.3d 407, 409 (6th Cir. 2004).

B. Eligibility for Asylum

Asylum analysis involves a two-step inquiry: (1) whether the applicant qualifies as a "refugee" as defined in 8 U.S.C. § 1101(a)(42)(A), and (2) whether the applicant merits favorable exercise of discretion by the immigration judge. *Patel v. Alberto Gonzales*, 470 F.3d 216, 218 (6th Cir. 2006). Mr. Fisenko has the burden to demonstrate he qualifies as a "refugee." 8 C.F.R. 1208.13(a). The term "refugee" means a person who is unable or unwilling to return to his or her country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Under that definition, therefore, Mr. Fisenko must show that he was either persecuted in the past on the basis of his Baptist faith or has a "well-founded fear" of

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[2] In articulating the "substantial evidence" standard, the Supreme Court quoted directly from 8 U.S.C. § 1105a(a)(4), which has subsequently been repealed and replaced by 8 U.S.C. § 1252(b)(4)(B). Although articulated differently, "'§ 1252(b)(4)(B) basically codifies the Supreme Court's substantial evidence standard.'" *Akhtar v. Gonzales*, 406 F.3d 399, 404 (6th Cir. 2005)(quoting *Yu v. Ashcroft*, 364 F.3d 700, 702 (6th Cir. 2004)).

persecution in the future. If Mr. Fisenko can establish past persecution, it is presumed that he has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1).

1. Past Persecution

If the government itself is not responsible for persecution, it must be unable or unwilling to control the people responsible in order for the applicant to be entitled to asylum. *See Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004)(citing *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)); *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009)(upholding the BIA denial of withholding of removal because there was substantial evidence that those inflicting harm were not individuals the government was unable or unwilling to control); *Raza v. Gonzales*, 484 F.3d 125, 129 (1st Cir. 2007) ("When an asylum claim focuses on non-governmental conduct, its fate depends on some showing either that the alleged persecutors are aligned with the government or that the government is unwilling or unable to control them."). *See also El Ghorbi v. Mukasey*, 281 F. App'x 514, 517 (6th Cir. 2008) (unpublished) (finding no eligibility for asylum or withholding of removal where petitioner could not establish that he was harmed by persons the government was unwilling or unable to control); *Kere v. Gonzales*, 252 F. App'x 708, 713 (6th Cir. 2007) (unpublished)(determining that no persecution exists where family members abused applicant because there was no evidence that the government was unable or unwilling to control the family members' conduct and protect the applicant). Of the six incidents relied on by Mr. Fisenko, only the final incident involved harm inflicted by the government itself, and the Immigration

Judge did not consider this incident because Mr. Fisenko did not corroborate it. As to the other five incidents, the Immigration Judge found that they were investigated by the police and the police took that investigation seriously, such that it could not be said that the government was unable or unwilling to control the Cossacks. The first incident that involved Mr. Fisenko's neighbors was never reported to the police. As a result, Mr. Fisenko did not demonstrate that the police would have refused to or been unable to investigate or prosecute his neighbors. The remaining four incidents were reported and on each occasion the police investigated. The police report for the incident involving the three drunk Cossacks in December 2003 indicates that the police did not prosecute them because the investigation revealed that the Cossacks "lack[ed] criminal intent" – namely, that they abused Mr. Fisenko because he resembled a "wanted criminal for burglary," lacked his identification papers to establish that he was not the wanted criminal, and attempted to run away from them. The police report for the incident in February 2004 involving the Cossack who got out of his car and hit Mr. Fisenko indicates that the police investigated the abuse, questioned the only witness, attempted to identify the owner of the car, and showed Mr. Fisenko pictures of known Cossacks in order to identify the assailant. Mr. Fisenko was unable to identify his assailant, and thus, the police were unable to locate him. The police report for the incident involving the two boys who broke Mr. Fisenko's windshield similarly establishes that the police questioned witnesses, and after discovering the identity of the two boys, put their names on the "list of the Department of Crime Prevention of Minors . . . as subjects who are prone to committing felonies." Finally, the police report for the incident during which

Mr. Fisenko's car burned indicates that the police investigated the cause of the fire and determined that it was not arson but rather "the short circuit of the electric wiring of the control panel" of his thirty-year old car.

Mr. Fisenko claims that the police reports were merely a cover up for the police officer's unwillingness to investigate his case, but Mr. Fisenko offered no evidence to support this claim and no reason to believe the police were involved in the Cossacks' abuse. Given the efforts by the police and forensic departments, this court is not compelled to reach a conclusion different from the Immigration Judge or to say that the abuses suffered by Mr. Fisenko were at the hands of individuals the government is unable or unwilling to control. Thus, this leaves only the last incident for our consideration- the incident involving Mr. Fisenko being detained for two days by the police. The Immigration Judge did not consider this incident because Mr. Fisenko failed to corroborate it.

While it is true that the testimony of the applicant alone if credible may be sufficient to sustain the burden of proof without corroboration, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided. *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004); 8 C.F.R. §§ 208.13(a); 208.16(b). "The absence of such corroborating evidence can lead to a finding that an applicant has failed to meet her burden of proof." *Dorosh*, 398 F.3d at 382, quoting *In re S-M-J*, 21 I. & N. Dec. 722, 724-26 (BIA 1997); *see also Abdulai v. Ashcroft*, 239 F.3d 542, 553 (3rd Cir. 2001)(holding failure to provide such evidence without adequate

explanation can support a finding that the applicant failed to meet his burden of proof). This corroboration rule can be applied even in cases where the testimony of the applicant is deemed credible. *Dorosh*, 398 F.3d at 382. *See also Abdulai*, 239 F.3d at 554 (upholding the Board's requirement that "otherwise-credible applicants . . . supply corroborating evidence in order to meet their burden of proof"). A reviewing court may not reverse an agency finding as to the availability of corroborating evidence unless the court finds a reasonable trier of fact would be compelled to conclude that such evidence is unavailable. 8 U.S.C. § 1252(b)(4).[3]

The Immigration Judge determined that Mr. Fisenko's testimony by itself did not meet his burden of proof because he failed to corroborate the final incident of alleged persecution that took place in June 2004, even though he testified his mother, sister, and grandmother knew about the incident. *See Dorosh*, 398 F.3d at 383 (noting it was reasonable to expect corroboration where petitioner was in contact with her mother in the Ukraine yet produced no affidavit from her mother corroborating the ill treatment of her daughter). When the Immigration Judge asked Mr.

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[3] This rule applies to the instant case, as it is applicable to all cases in which the "final administrative removal order is or was issued before, on, or after the date of the enactment of the REAL ID Act- May 11, 2005. See Real ID Act of 2005, § 101(h)(3), Pub.L. No. 109-13, 119 Stat. 231, 305-306. However, other provisions of the Immigration and Nationality Act that were amended by the REAL ID Act do not apply to this case because those changes apply only prospectively to applications for asylum made on or after May 11, 2005. See REAL ID Act § 101(h)(2). Mr. Fisenko's application for relief was filed on March 23, 2005.

Fisenko why he failed to provide letters from his family members corroborating this last incident, Mr. Fisenko responded "I, I didn't know that I could get those letters, and they could be helpful. I'm also scared, and, I fear for their lives. So, I, I told them not to talk about me much." J.A. 100. The Immigration Judge implicitly rejected Mr. Fisenko's given reason when he stated in his oral opinion:

> There appears to me to have been reasonably available corroboration, which was not produced. Respondent admitted that there are people in Russia who know about the incident or who he says know about the incident. He named specifically certain family members, including his mother. Yet, he did not provide any statements from any people who had knowledge of this incident. No one corroborate[d] his claim. The incident is serious because this is really the only one that involves the police authorities of Russia themselves rather than Cossacks or private individuals. And yet, he provided no statement or affidavit or letter or live witness of any persons who could corroborate it.

J.A.20.

The Second and Third Circuits use a three-part test for analyzing corroboration. *See Diallo v. INS*, 232 F.3d 279, 290 (2d Cir. 2000); *Abdulai*, 239 F.3d at 554. The test requires that the Immigration Judge to (1) identify the facts for which "it is reasonable to expect corroboration; (2) [make] an inquiry as to whether the applicant has provided information corroborating the relevant facts, and if he or she has not, (3) [analyze]

whether the applicant has adequately explained his or her failure to do so." *Abdulai*, 239 F.3d at 554, quoting in part *In re S-M-J*, 21 I. & N. Dec. 722, 724-26 (BIA 1997). Mr. Fisenko argues the Immigration Judge did not comply with this test because he did not analyze why Mr. Fisenko's explanation that he feared for his family was inadequate. The Sixth Circuit has yet to formally adopt all three parts of this test in any published decision, but we have indicated support for the test in at least one unpublished case. *See Niang v. Gonzeles*, 195 F. App'x 371, 377 (6th Cir. 2006)(unpublished). Mr. Fisenko argues that the Sixth Circuit has adopted this test because *Dorosh* cited *Diallo* and *Abdulai*, *supra*, when indicating we agreed with their approach that corroboration should be provided where reasonably available. But *Dorosh* did not explicitly adopt the three-part test from these cases nor did it adopt a requirement that the Immigration Judge specifically address on the record why an applicant's explanation is insufficient, and Mr. Fisenko points this court to no published Sixth Circuit case law that does.

We decline to adopt the test from the Second and Third Circuits in this case because the policy behind the test, clarity for purposes of judicial review, is not furthered by applying the test here. In *Diallo*, petitioner stated he could not corroborate his story because his identity papers were destroyed, he received only one hand-delivered letter from his sister since he arrived in the United States, he had not been able to communicate directly with his family, and he lost his refugee camp identity card during his travels. 232 F.3d at 289. The immigration judge in *Diallo*, after being given such concrete reasons why the applicant could not provide the requested corroboration, failed to

address why these reasons were insufficient. The court noted that because no assessment was made of the petitioner's reasons why he failed to produce the corroboration, the court could not know whether the BIA or the IJ credited his explanations, which at least facially, appeared reasonable. *Diallo*, 232 F.3d at 289. Because the applicant listed multiple reasons for his failure to corroborate his evidence, the Second Circuit could not determine for purposes of appellate review on what basis the immigration judge found the applicant's testimony insufficient where the immigration judge did not explain his reasons. In *Abdulai* the record was even less clear as the BIA never explained what aspects of Abdulai's testimony should have been corroborated or whether Abdulai ever adequately explained his inability to do so. As in *Diallo*, the court noted that without mentioning what particular aspects of the applicant's testimony it would have been reasonable to expect him to corroborate and without an explanation about his inability to do so, the court could not effectively review the case. *Abdulai*, 239 F.3d at 554 . The court expounded on its reasoning by stating:

> We acknowledge that our standard of review is extraordinarily deferential to the BIA, and that nothing in the INA specifically requires the Board to explain its decisions. But the availability of judicial review (which is specifically provided in the INA) necessarily contemplates *something* for us to review. In a case quite similar to this one, the Second Circuit vacated and remanded a decision by the BIA so that the Board could further explain its reasoning. *See Diallo v. INS*, 232 F.3d 279, 288-90 (2d Cir. 2000). We have done the same

> when deficiencies in BIA decisions have made them impossible to review meaningfully. *See, e.g., Sotto v. USINS*, 748 F.2d 832, 837 (3d Cir. 1984). Because the BIA's failure of explanation makes it impossible for us to review its rationale, we grant Abdulai's petition for review, vacate the Board's order, and remand the matter to it for further proceedings consistent with this opinion.

Id. at 555 (emphasis in original).

Here, the Immigration Judge asked Mr. Fisenko why he did not provide the corroborative evidence, and Mr. Fisenko testified he feared for his family. Because Mr. Fisenko testified to only one reason on the record and gave no further testimony that would make this fear reasonable, it is clear why the Immigration Judge rejected it.[4] Mr. Fisenko gave no testimony that would indicate his sisters, mother, or grandmother were in any kind of danger simply by being related to Mr. Fisenko or that they were targets of any threats themselves. Nor did he explain why he feared that they would be harmed for statements made in private communications sent to him. In *Dorosh*, petitioner argued that getting corroboration from her mother would have jeopardized her mother's safety. 398 F.3d at 383. But the Court found that despite petitioner's fears, she could have requested a letter "in a manner that minimized any risk of sensitive statements being overheard." *Id.* Because Mr. Fisenko gave only one

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[4] Mr. Fisenko's comment that he did not know that information could be helpful is not sufficient to show that the evidence is unavailable.

reason without any additional support for his lack of corroboration, it is clear for purposes of review why that reason was implicitly rejected by the Immigration Judge. Thus, the policy of having a clear record for judicial review is not jeopardized in this case and it is not an appropriate case in which to adopt the three part reasoning from the Second and Third Circuits. Under Sixth Circuit case law, the immigration judge's conclusion that Mr. Fisenko could have reasonably corroborated the last and most serious incident occurring in June 2004 is sufficient, and this court is not compelled to conclude that such corroboration was unavailable so as to warrant reversing the Immigration Judge's findings. See 8 U.S.C. § 1252(b)(4).

Mr. Fisenko also argues that any affidavits from his family detailing the June 2004 incident would have been inadmissible hearsay. But immigration proceedings are not governed by the Federal Rules of Evidence, *see Singh v. Ashcroft*, 398 F.3d 396, 406-407 (6th Cir. 2005), and this court has found hearsay evidence is admissible as corroborating evidence in immigration proceedings. *See Keita v. Gonzales*, 175 F. App'x. 711, 713 (6th Cir. 2006) (unpublished). *See also Kasa v. Gonzales*, 128 F. App'x 435, 441 (6th Cir. 2005).

This court is bound by the REAL ID Act of 2005 and may not reverse an agency finding as to the availability of corroborating evidence "unless the court finds. . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." 8 U.S.C. § 1252(b)(4) (as amended by The Real ID Act of 2005). Given that Mr. Fisenko could have obtained corroboration for this last incident, this

court is not compelled to conclude that corroboration was unavailable. The fact that he did not corroborate his evidence of the June 2004 incident takes that incident out of consideration when determining whether Mr. Fisenko's abuse was at the hands of individuals the government was unable or unwilling to control. As to the other five instances, the Immigration Judge reasonably concluded that Mr. Fisenko failed to demonstrate that the individuals who carried out these abuses were individuals the government was unable or unwilling to control.

Because Mr. Fisenko cannot demonstrate the abuse he experienced in Russia at the hands of the Cossacks was abuse undertaken by those the government was unable or unwilling to control, his claim that he suffered past persecution fails. Thus this court need not analyze the other two grounds relied on by the Immigration Judge- that the abuse was not severe enough to rise to the level of persecution and that Mr. Fisenko failed to show his abuse was on account of his Baptist faith.

2. Well-founded Fear

Even if Mr. Fisenko does not demonstrate that he was persecuted in the past, he can still prevail on his claim for asylum if he can show he has a well-founded fear of persecution in the future.[5] Because Mr. Fisenko

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[5] Respondent argues that Mr. Fisenko waived this argument in his opening brief because he does not challenge that his fear was objectively reasonable or that it would be unreasonable for him to relocate in Russia. In fact, Mr. Fisenko discusses the reasons he believes his fear was well-founded, including his past abuse and country conditions on the record. Mr. Fisenko also argues that it

did not carry his burden of demonstrating past persecution, he is not entitled to a presumption that he has such a fear. Instead, Mr. Fisenko must demonstrate he has a well-founded fear by showing: (1) he has a fear of persecution in his country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion; (2) there is a reasonable possibility of suffering such persecution if he were to return to that country; and (3) he is unable or unwilling to return to, or avail himself of, the protection of that country because of such fear. 8 C.F.R. 208.13(b)(2)(i). The Immigration Judge's decision turns on the second prong - whether there was a reasonable possibility of suffering persecution upon return to Russia.

a. Objective Fear

A well-founded fear of persecution has both a subjective and objective component. The asylum applicant must actually fear he will be persecuted upon return to his country and he must establish that an objective situation exists under which his fear can be deemed reasonable. Ali v. Ashcroft, 366 F.3d 407, 410-11 (6th Cir. 2004). "'[T]he objective component requires the applicant to prove that either (a) there is a reasonable probability that he or she will be singled out individually for persecution, 8 C.F.R. § 208.13(b)(2)(i); or that (b) there is a pattern or practice of persecution of an identifiable group, to which the alien demonstrates he belongs, such that the

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is the Government's burden to demonstrate relocation is reasonable. Thus, Mr. Fisenko did not waive these arguments.

alien's fear is reasonable.[6] 8 C.F.R. § 208.13(b)(2)(iii).'" *Akhtar v. Gonzales*, 406 F.3d 399, 404 (6th Cir. 2005)(quoting *Capric v. Ashcroft*, 355 F.3d 1075, 1085 (7th Cir. 2004) (internal citation omitted)).

The term "well-founded fear" can only be given concrete meaning through case-by-case adjudication. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). In order to show a well-founded fear of persecution, the applicant does not need show that he probably will be persecuted if he is deported; "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." *Id.* at 431. The Supreme Court has stated that even a showing of a ten percent likelihood of persecution in some situations could suffice to establish that an applicant's fear is well-founded. *See id.* (citing a "leading authority" for the proposition that where every tenth adult male person is either put to death or sent to some remote labor camp it would be apparent that anyone who escaped from the country would have a "well-founded fear" of being persecuted upon return). *See also Castaneda-Hernandez v. Immigration & Naturalization Service*, 826 F.2d 1526,

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[6] Respondent argues that Mr. Fisenko failed to exhaust his argument that Mr. Fisenko's fear is well-founded because there is a "pattern or practice" of persecution of Baptists in Russia. *See Ramani v. Ashcroft*, 378 F.3d 554, 559-60 (6th Cir. 2004)(discussing failure to exhaust); 8 C.F.R. §1208.13(b)(2)(iii)(A)(pattern and practice standard). While there may be some support for Respondent's position because Mr. Fisenko did not use the words "pattern or practice" in his brief to the BIA, regardless of whether this claim was exhausted, Mr. Fisenko has not shown a pattern and practice of persecution exists for the reasons discussed above.

1530 (6th Cir. 1987) (interpreting *Cardoza-Fonseca* as characterizing the lower threshold for asylum eligibility as even a 10% chance of persecution but also noting that the Supreme Court avoided a definitive attempt to define the phrase "well-founded fear").[7] Because a well-founded fear of persecution can be based on what has happened to others who are similarly situated, it is "necessary, in considering an applicant's asylum petition, to weigh evidence of general conditions in the country of origin and the foreign government's history of treatment of others engaged in similar activities." *Perkovic v. INS*, 33 F.3d 615, 621 (6th Cir. 1994). In order to reverse the Board's determination, this court would have to decide that the evidence compels a reasonable fact finder to conclude that there is a reasonable possibility that Mr. Fisenko would suffer persecution if he were to return to Russia. 8 C.F.R. § 1208.13(b)(2)(B); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998).

While the Immigration Judge acknowledged that there was "significant information in the record" to establish that the Cossacks were responsible for some abuses against practitioners of minority religions in Russia, he did not find the information on the record supported that any of these abuses amounted to persecution carried out by people the government was unwilling or unable to control. For example, the

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[7] Respondent argues that Mr. Fisenko failed to exhaust the argument that a ten percent showing would suffice to establish a well-founded fear. But Mr. Fisenko did argue he had a reasonably well-founded fear in his brief to the BIA and his citation to the fact that even a ten percent chance of persecution could support a well-founded fear standard only lends further support to his argument.

United States Department of State Country Report on Human Rights Practices for Russia for 2005 ("2005 Country Report"), and the United States Department of State International Religious Freedom Report for Russia for 2005 ("2005 Religious Freedom Report") indicate incidents of harassment and violence against religious minorities, including the bombing of two unregistered Baptist churches in 2004, and one registered Baptist church in 2005. While the reports indicate no progress was made in the investigation of these explosions, the reports do not indicate that such abuse was at the hands of the government or that the reason for the lack of progress was the government's inability or unwillingness to control the perpetrators. The fact that these incidents occurred does not demonstrate that the government is unable or unwilling to control the perpetrators of these, or similar, incidents. The 2005 Country Report states that the "authorities usually investigated incidents of religious vandalism and violence." J.A. 182. Although the Report further states that "arrest of suspects were extremely infrequent and convictions rare "(J.A. 182), the report does not indicate that the reason for the low arrest, prosecution, or conviction rates was because the government was unable or unwilling to control the perpetrators.

As to acts carried out by the government itself, Mr. Fisenko argues that one Baptist minister was prevented from returning to Russia (although the report does not indicate why), a Baptist community was prevented from renting the premises at a public library since 2003, and a rebuilding permit for one Baptist church was denied by the government (although the church was eventually rebuilt and services held there without interruption). Mr. Fisenko

also argues that a 1997 law targets minority religions by making it difficult for members of less well-established religions to set up religious organizations; and grants rights such as opening a bank account and owning property to religious groups who are registered, while members of unregistered groups do not have these same rights. While unfortunate, these examples of discrimination against minority religions and this 1997 law are not examples of persecution such that they would support Mr. Fisenko's well-founded fear. "Persecution" within the meaning of 8 U.S.C. § 1101(a)(42)(A) "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty." *Mikhailevitch*, 146 F.3d at 390. It is clear, no doubt, that there maybe some tension between minority religions and the government of Russia, but this court is not compelled to conclude based on the evidence in the record that such tensions amount to persecution sufficient to support Mr. Fisenko's well-founded fear of future persecution.

Noticeably absent from either report is any significant mention of the Russian Cossacks. Instead, Mr. Fisenko has submitted articles detailing the Cossack's role in the Russian government and their reputations as fierce nationals. According to one article in the record, in southern Russia, "Cossack paramilitary units have figured prominently in violent campaigns to persecute and expel ethnic minorities and illegal immigrants -- often with tacit official approval." J.A. 157. Although characterizing Cossacks as violent and such violence as receiving "tacit official approval," this statement still does not say that Cossacks target religious minorities in general or

Baptists in particular. Instead, it refers to "ethnic minorities and illegal immigrants."

The record in this case indicates that the Russian government supports the Cossacks in general and that they have now been officially recognized by the government, but the record does not demonstrate that the government supports Cossacks who abuse religious minorities or that the government refuses to investigate allegations of Cossack criminal behavior. The 2005 Country Report and the 2005 Religious Freedom Report do not make any mention of incidents in which the Cossacks engaged in violence against religious minorities. The 2005 International Religious Freedom Report states that "[t]he Constitution provides for freedom of religion, and the Government generally respects this right in practice, however, in some cases the authorities imposed restrictions on certain groups. Although the Constitution provides for the equality of all religions before the law and the separation of church and state, the Government did not always respect these provisions." J.A. 245. "[The] government policy continued to contribute to the generally free practice of religion for most of the population." J.A. 244. Given these conditions in Russia, this court is not compelled to conclude Mr. Fisenko has a well-founded fear of persecution.

Mr. Fisenko argues that his production of one witness, Natalaya Shetsova, compels the conclusion that he has a well-founded fear of future persecution. Ms. Shetsova was granted asylum in the United States after fleeing Krasnador, Russia with her parents in 1997. Ms. Shetsova's affidavit states she and her family were persecuted on account of her Baptist religion in Russia. Apart from the fact that Mr.

Fisenko and Ms. Shetsova are both Baptists from Krasnador, they seem to have little else in common. Ms. Shetsova's affidavit makes no mention of the Cossacks, nor does it name her aggressors. Moreover, the affidavit does not explain the reasons that Ms. Shetsova was granted asylum.

b. Relocation

Mr. Fisenko will not be considered to have a well-founded fear of persecution if he could avoid persecution by relocating to another part of Russia if under all the circumstances it would be reasonable to expect him to do so. 8 C.F.R. § 208.13(b)(2)(ii). Where the applicant has established past persecution, it is presumed that internal relocation would not be reasonable and it is the Service's burden to show otherwise. See 8 C.F.R. § 208.13(b)(3)(ii). However, because Mr. Fisenko has not established past persecution, he has the burden of establishing that it is not reasonable for him to relocate. 8 C.F.R. § 208.13(b)(3)(i). Relying on the 2005 Country Report and the 2005 International Religious Freedom Report, the Immigration Judge concluded that Mr. Fisenko failed to demonstrate it was unreasonable for him to relocate within Russia without persecution. The only reason Mr. Fisenko gave for being unable to relocate within Russia is his opinion that the Cossacks "live all over Russia." J.A. 89. Mr. Fisenko's opinion that Cossacks "live all over Russia" is insufficient to demonstrate that it would not be reasonable for him to relocate within Russia. Even the evidence submitted by Mr. Fisenko that details abuses by the Cossacks against ethnic minorities describes these acts as occurring in "southern" Russia. J.A. 157. The evidence

does not mention such abuses by Cossacks in other areas of the country.

Mr. Fisenko has submitted a large amount of evidence that could lead this court to believe it would have decided the matter differently, but because this evidence does not compel a contrary conclusion, Mr. Fisenko's petition must be denied. Given that there is no clear evidence in the record that the Russian government supports or tolerates persecution of Baptists at the hands of the Russian Cossacks or anyone else and that there is no clear evidence in the record that Mr. Fisenko could not safely relocate to another part of the country, this court is not compelled to conclude that Mr. Fisenko has demonstrated a well-founded fear of future persecution. Thus, based on the facts before the Immigration Judge and the BIA, this court does not conclude that "any reasonable adjudicator would be compelled" to find a contrary result. 8 U.S.C. §1252(b)(4)(B); *see Yu*, 364 F.3d at 702.

C. Withholding of Removal

Mr. Fisenko also petitions for review of the administrative denial of his request for withholding of removal. Withholding of removal is mandatory if the alien establishes that his "life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); *Pilica*, 388 F.3d at 951. Where an applicant seeks withholding of removal, he faces a burden that is more stringent than that required for a claim for asylum. *Khalili*, 557 F.3d at 435. He must demonstrate "that there is a clear probability that he

will be subject to persecution if forced to return to the country of removal." *Singh*, 398 F.3d at 401 (quoting *Pilica*, 388 F.3d at 951). Because this burden is more stringent, Mr. Fisenko's failure to establish his eligibility for asylum likewise results in his failure to satisfy the more onerous burden for withholding of removal. *See, e.g., Koliada v. INS*, 259 F.3d 482, 489 (6th Cir. 2001) (per curium).

III. CONCLUSION

Based on the foregoing reasons, this court DENIES Mr. Fisenko's petition for review.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A098 814 305 - Cincinnati, OH

Date: AUG 15 2008

In re: SERGEY FISENKO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Inna Simakovsky, Esquire

ON BEHALF OF DHS: Ryan Alger
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum; withholding of removal; protection under the Convention Against Torture

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge denying relief to the respondent. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). We agree that under the law of the Sixth Circuit, the federal judicial circuit in which this case arises, the failure to present evidence corroborating the respondent's conversion and membership in the Baptist church in Russia is sufficient to support the Immigration Judge's finding that the respondent did not meet his burden of proof, even where the respondent's testimony is credible. *See Shkabari v. Gonzales,* 427 F.3d 324, 331 (6th Cir. 2006); *see also Dorosh v. Ashcroft,* 398 F.3d 379, 382 (6th Cir. 2004); *Matter of S-M-J-,* 21 I&N Dec. 722 (BIA 1997). Accordingly, the appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT
Cincinnati, Ohio

File No.: A 98 814 305

[Dated October 24, 2006]

In the Matter of	)
SERGEY FISENKO	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (1) (B) of the Immigration and Nationality Act, as amended.

APPLICATIONS: Asylum pursuant to INA 208(a); withholding of removal pursuant to INA 241(b) (3); withholding of removal under the UN Convention against Torture.

ON BEHALF OF RESPONDENT: Inna Simakovsky

ON BEHALF OF DHS: Ryan Alger
Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is an adult male, native and citizen of Russia, who was issued a Notice to Appear on May 13, 2005. The Notice to Appear charges that the respondent is removable under Section 237 (a) (1) (B) of the INA because he remained in the United States for a time longer than permitted.

The respondent admitted the factual allegations in the NTA, and conceded removability. See INA Section 240 (c) (1) (A). The Court finds that removability has been established by clear and convincing evidence. Russia is designated as the country of removal. The issue before the Court concerns the respondent's application concerns the respondent's applications for relief from removal, specifically asylum, withholding of removal pursuant to the INA and withholding of removal under the UN Convention against Torture. The hearing in this matter was conducted in Cincinnati, Ohio through video conference.

I will deny the respondent's applications for asylum, for withholding of removal pursuant to the INA, and for withholding of removal pursuant to the Convention against Torture.

EVIDENCE OF TESTIMONY

The respondent bases his claim on an assertion that he has been persecuted in Russia on account of his Baptist religion, and that he fears future persecution on the same basis should he be required to return to Russia.

The following documents were marked and entered into evidence:

Exhibit 1: the Notice to Appear.

Exhibit 2: the G-28 for a prior counsel in the matter, Attorney Rose from New York.

Exhibit 3: an I-589 or asylum application of the respondent with a copy of a Russian passport and a copy of an I-94 card.

Exhibit 4: a January 13, 2005 motion to reopen filed by current counsel for the respondent with Tabs A through G (this exhibit includes an I-589 and statement of the respondent).

Exhibit 5: an October 9, 2006 submission by counsel for the respondent with Tabs 1 through 11 (this exhibit includes the 2005 State Department Human Rights Report and the most recent International Religious Freedom Report for Russia).

Exhibit 6: a CD ROM, which contains British produced show or documentary entitled "Death of a Nation." The minutes of the CD ROM, which were viewed by the Court at today's hearing, and which are in evidence, are those beginning at minute number 20 and going through minute number 30 on the CD ROM.

The respondent presented the following witnesses:

The respondent himself testified on both direct and cross-examination. In addition, two additional witnesses were present: One was available by telephone; the other was available in court today.

Instead of taking their live testimony, we accepted by proffer their statements, which appear respectively at Exhibit 5, Tab 8 and Exhibit 5, Tab 11. Those two witnesses are Angela Plummer and Natalya V. Shevtsova. Again, those witnesses were available to testify, but the Court accepted, and the Government agreed to take their written statements as a proffer of what their oral testimony would be.

The respondent himself testified in summary in the following fashion. He indicated that he was born in Russia, and that he is currently married. He is divorced from his first wife, but apparently, married his current spouse last month in September of 2006, here in the United States. He testified that he is unable to have children, and that this upset and depressed him when he learned of it back in Russia. He indicated that he was a graduate of a university and is qualified to teach both biology and chemistry. He stated that his parents were atheists, and that he himself was an atheist while growing up. However, he testified he is now a Baptist. He said that he was invited to a prayer house in the year 2003, and was eventually baptized, along with several other people at a Lake in Russia. He indicated that after he accepted Christ in his heart, he was baptized by a pastor named Nikolai. He indicated that he attended church in Russia once a week. He indicated that people in Russia did not really understand his conversion and why he believed the things that he did once he became a Baptist. He stated that rumors spread that he was not an Orthodox Christian, and that people mocked him, specifically Cossack families who lived around him. He said they called his religion a sect and told him that he had to stop or move out of the area. The respondent testified as to or about six separate incidents of

problems he experienced in Russia prior to coming to the United States. They are essentially the same incidents that he detailed in his written statement with his asylum application. The first incident took place in November of 2003. He stated that he was on his way home from work, and that neighbors would not let him enter his house. He said they assaulted and humiliated him and tried to beat him, but he was able to get away and get into the door of his house. He said they threatened him. The second incident the respondent testified to involved some drunk Cossacks who he said were on patrol and stopped him and humiliated and assaulted him. He said they demanded his identification papers or cards. He said they made fun of him. He said they beat him on his back, and he fell to the ground, and they beat him with fists and boots. He said he was handcuffed by them and pushed into their car and taken to the Cossack Headquarters. He said once there, he saw a sober Cossack, who threatened to take him to the police station for resisting authorities. The respondent stated that he told this individual that he had done nothing wrong, and that he, the respondent, planned to file his own complaint with the authorities. He said that they then splashed vodka on him, and that the sober Cossack took him to a hospital. He said that he was given a shot at the hospital and released. He indicated later in his testimony that during this incident, the Cossacks who accosted him were calling him Baptist and other names, but they did not actually say why they were beating him. He stated that before he was released from the hospital, they told him he had a hematoma on his kidneys and had suffered a concussion. Once released from the hospital, he went to the police to report the incident. He said the police sent him to forensics, but they never really followed up or did

anything. He said the police said that the Cossacks thought that the respondent was a criminal, and that that is why they had behaved the way they had. He said the police also told him that simply being handcuffed for 2 hours was not a serious enough assault to pursue the matter against the Cossacks. The third incident the respondent testified to allegedly took place in February of 2004. He said that a Cossack assaulted him, called him a Baptist and dirty words, and hit him. He said the individual then got into a car and left. He filed a police report on this occasion as well. He testified that he was again sent by the police to forensics to see if he was really beaten. He stated that the police indicated there was a witness, and that they were looking for the person responsible for the incident, but that they could not find him. The fourth incident involved an attack on the respondent's car. Specifically, he testified that some children, one of whom was the son of a person he knew, broke the window in his car. The respondent testified that he believes that the child did this because he knew that his father wanted to get at the respondent because he is a sect member. He testified that he did report this to the police as well, but that there was no action taken against the boys, no criminal fine was imposed, but he indicated that the police report did say that he was free to bring a civil suit against the parents of the boys. He also said that they put the children on a list that the police said that they were going to keep an eye on or watch. The fifth incident he testified to involved a fire on another car of the respondent. He said that his car was burned, and that he called the police and fire department. He believes that the fire was set in order to get him to move out of the area because he was a Baptist. However, he said that there was an official document issued by the authorities after

investigating the incident, saying that the fire had essentially started on its own. Finally, the sixth and last incident he testified to took place in June of 2004. The respondent said that he came home to find his dog hanged, the window of his home broken, and gasoline tanks set inside his house. He said that he then called the police. When they came, he said they actually took him to the police station for interrogation. He said that once there, he was put into a jail cell and kept there for 2 days under poor conditions. He said he was beaten, and that his head was put under water during what the police called baptismal procedure. He said he was hit in ways so it would not show his injuries. We testified that the police said they were very tired of him, and that the Cossacks were right, and that if he did not leave the area, he would be hung just like his dog was. He testified they asked him about his prayer house and how many members attended, and who the persons were who had assaulted and beaten him. He said the police officers actually knew who he was and eventually after 2 days, pushed him out and told him to "get lost." He did not complain to the police or prosecutorial or other authorities after this incident, indicating essentially he felt that it would not have done any good because the police themselves were involved in the incident. He testified that approximately 1 to 2 months later, he left Russia for the United States. He indicates that he currently attends church on Sundays here in the United States. He believes he cannot practice his Baptist religion in Russia freely. He also said that he believes Cossacks are located all over Russia. He said he believes that if he returns to Russia, that he may be killed, and that his body may disappear. On cross-examination, which I will detail only partially, the respondent testified as follows. He indicated that during the December 2003

incident, that the Cossacks after stopping him, did ask for his identification. However, he also said that they actually knew who he was when they asked for his ID. Respondent testified that he did not have any identification with him at the time. He also said that he attempted to run away from the Cossacks. He indicated that he was taken to the Cossack station, not the police station, and that he ultimately went along with a sober Cossack who was at the station to the hospital. He indicated that after his release from the hospital, he ultimately went to file his report with the police. He indicated on cross-examination, that he married his current wife on September 2, 2006, at the beginning of last month. He stated that he knew his wife in Russia, and that they had studied at the same university. He testified that he has known her for 10 years, and that she came to the United States to study, and once here, he made his proposal to her. Respondent said that he knew she was coming. She arrived, he said, on August 25, 2006, and confirmed that they then got married 7 or 8 days after her arrival here in the United States. He testified that she did not know he was going to propose when she arrived here in the United States, but that they were in love and had been in love for some time and shared the same faith. He confirmed that he grew up as an atheist prior to his conversion, and that neither he nor his parents who are also atheists, had experienced any problems in Russia as atheists. He confirmed that when his car was set on fire, he did not actually see if anyone had set the fire. He also confirmed it was a very old car, but that he also said that he was aware of no mechanical problems with it. He indicated that he heard the firemen who came to put out the fire in his car talking among themselves, and he thought he heard them say that the Cossacks had done it, and

that they were glad they had done so. He also confirmed that after the incident involving the two boys breaking the window in his car, that the police did investigate, and that they put the boys on two lists, and that they had indicated that compensation could be sought for the incident through civil litigation. The Court also asked a few questions after cross-examination. For example, I asked the respondent why he had not obtained any statements from a pastor or any fellow Baptists in Russia, confirming his conversion, his practice of the Baptist faith or any of the incidents he described. His answer was somewhat unclear to the Court, but it did not seem to provide in my opinion an adequate explanation for the failure to provide this form of corroboration, which does seem reasonably available. There is, as noted by counsel for the respondent, a statement from a pastor of a church here in the United States, indicating that the respondent attends services there. She also indicated that he was asked to come and testify at today's hearing, along with another individual, but they both had conflicts and so were unable to do so. The Court also asked the respondent why he had not produced any corroboration from individuals who were aware of the June 2004 incident prior to his coming to the United States. He stated that there are individuals, such as certain relatives, including his mother, who are aware of that incident, but he stated he did not know that he needed statements from them about it. He also said that he is afraid for them. That is a general summary of the testimony of the respondent. For a complete rendition of his testimony, one need only review the full record of proceedings and transcript in this case.

The Department of Homeland Security opposes the respondent's applications for relief. DHS argues that the respondent has not met his burden of proof of establishing past persecution under the INA, nor has he shown or met his burden of proof with respect to a well-founded fear of future persecution on account of a protected ground.

STATEMENT OF THE LAW

Burden of Proof, Credibility and Corroboration.

The respondent has the burden of proof on the applications for relief.

In meeting his burden, respondent's credibility is very important and may be determinative. While it may be possible to grant an application solely on the basis of a respondent's testimony, to do so, that testimony should be believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. Matter of Dass, 20 I&N Dec. 120 (BIA 1989). Testimony is not considered credible when it is inconsistent, contradictory with current country conditions or inherently improbable. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997). Any material discrepancies or omissions should be explained satisfactorily by the respondent. Generally, corroborating evidence should be presented where it is reasonably available. Matter of Dass, supra. A respondent who does not offer such reasonably available corroborating evidence should explain the failure to do so. Matter of S-M-J-, supra.

Asylum.

To be eligible for asylum, the respondent must show that he is a "refugee" within the meaning of the Immigration and Nationality Act. INA Section 101(a)(42)(A). To do so, he must demonstrate that he is unwilling or unable to return to the other country, in this case, Russia, because of persecution or a well-founded fear of persecution on account of his race, religion, nationality, membership in a particular social group or political opinion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). A well-founded fear of persecution must be both subjectively genuine and objective reasonable. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

Persecution within the meaning of the Immigration and Nationality Act does not encompass all treatment that society regards as unfair, unjust or even unlawful or unconstitutional. Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997). To qualify for asylum, the harm suffered or feared by the applicant must be at the hands of the government or an agent that his government is unwilling or unable to control. Matter of S-A-, 22 I&N Dec. at 1335 (BIA 2000).

If the respondent establishes past persecution, there is a regulatory presumption that he has a well-founded fear of future persecution on the same basis. 8 C.F.R. 1208.13(b)(1). In the absence of past persecution, the respondent must demonstrate a well-founded fear of future persecution. 8 C.F.R. 1208.13(b)(2)(I_).

Withholding of removal.

To qualify for withholding of removal, the respondent must show that his life or freedom would be threatened in the other country because of his race, religion, nationality, membership in a particular social group or political opinion. INA Section 241 (b) (3). That is, the respondent must show a "clear probability" of persecution on one of the enumerated grounds. INS v. Stevic, 467 U.S. 407 at 413 (1984). To meet that standard, the respondent must show that it is "more likely than not" that he will be persecuted in the other country on one of those grounds. See Matter of Mogharrabi, supra. This is a higher standard than for asylum.

Relief under the Convention against Torture.

To be eligible for withholding of removal under the Convention against Torture, the respondent must show that is more likely than not that he will be subject to torture in the other country "by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity." 8 C.F.R. 1208.18 (a) (1). Unlike asylum, which requires a showing of nexus, for CAT protection, the respondent need not establish that the torture is on account of any particular ground. See Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000).

FINDINGS AND ANALYSIS

The Court has considered all of the testimony and document evidence presented in this case. I will first address the credibility of the respondent. I have had the opportunity to listen to his testimony and to

observe his demeanor. I find him to be a generally credible witness. His testimony was fairly detailed, plausible, largely internally consistent and generally consistent with the asylum application and statement that he filed. The respondent appeared to testify and answer questions sincerely and forthrightly.

However, despite the respondent's generally credible testimony, based on the totality of the testimony and evidence presented in this case, I find that the respondent has not met his burden of proof that he has suffered past persecution in Russia by the government or by agents the government was unwilling or unable to control on account of his Baptist religion. As indicated, there were six separate incidents of past problems testified to by the respondent today. The first incident in November of 2003, involved a confrontation with neighbors, who allegedly pushed and punched him. I do not believe this rises to the level of persecution as unfortunate and regrettable as the incident was. Moreover, it does not seem to have been undertaken by the government nor has it been shown to be by persons the government was unwilling or unable to control. There is no indication in the record of proceedings that the respondent reported this incident to the police, and there is no police report in the record of proceedings. The second incident in December of 2003, involved the three drunk Cossacks or people in Cossack uniforms, who stopped him. What happened to him on that occasion could have in the view of the Court potentially risen to the level of persecution. He says he was beaten and handcuffed and brought to the station of the Cossacks. However, I do not believe that it is clear that this incident, as serious and as unfortunate as it was, did rise to the level of persecution under U.S. asylum

law. Even assuming it did, it appears that it was undertaken by drunk, renegade Cossacks, and that after reporting the matter to the police, the police did look into it. The police report in the record of proceedings may not comport with the respondent's testimony as to exactly what happened and how, but it does indicate that there was an investigation, and that an ultimate determination was made that a criminal case against the Cossacks was not appropriate in the view of the police. Whether this was a right or wrong determination by the police, at a minimum, it shows that the matter was investigated, and apparently, they took it somewhat seriously. It undermines any assertion that the acts by these Cossacks were by individuals that the government was unwilling or unable to control. In other words, the police report in this incident or of this incident, and the other police reports, which I will discuss shortly, suggest that Cossacks cannot just act with total impunity in Russia, and that the police will at least look into allegations of abuse by them. That is not to say that the Cossacks never engage in such abusive acts; but rather, they are not free to do so in the eyes of the government or the police. The third incident took place apparently in December of 2004, and that also involved a person the respondent believed was a Cossack. However, in this incident, he was hit by the Cossack who then got in a car and drove away. It does not appear to have risen to the level of persecution, and the motivation for the incident is somewhat unclear. In any event, again, there was a police report, which the respondent produced, and which is in evidence, and which states that the police investigated the incident but were unable to identify the person responsible for the attack on the respondent. Again, this undermines a claim that it was undertaken by persons the government was

unwilling or unable to control. The fourth incident involved two boys, that is, they threw stones or somehow broke his window or windshield on his car later in 2004. Once again, the matter was reported to the police. Once again, the police took some kind of action. Whether it was a full and fair investigation is not clear. It is beyond the scope of my ability to review the matter to make such a conclusion, but what I can see is that there was some sort of investigation, and that they filed a report, indicating that because the two boys were underage, that they would not bring charges against them. The report also suggests that the respondent was free to seek damages through civil litigation. The fifth incident involved the burning of his next car. As with the other incidents which did not rise to the level of persecution, this one too, while unfortunate and serious, does not seem serious enough to constitute persecution either on its own or in the aggregate with the other events. More importantly, or as importantly, there is no indication in the record as to who was responsible for the burning of the respondent's car. Again, there was a police report, and the report indicates that the likely cause of the fire was a short circuit of the electrical wiring in the car. The respondent himself confirmed that the car was very old, and that he did not see anyone actually set the fire in his car. Turning now to the last incident, which is the most serious in many ways, I note the following. It took place allegedly in June of 2004. Respondent states that, as I said earlier in this oral decision, he returned home to find his dog dead and hanging, the window to his home broken, and that when he called the police, he was actually taken by the police to jail and held under poor conditions for 2 days. It is possible that the alleged treatment that he received during those 2 days and his being held for

that period might rise to the level of persecution under U.S. law. However, my concern over this incident is the following. There is no corroboration for it. There appears to me to have been reasonably available corroboration, which was not produced. Respondent admitted that there are people in Russia who know about the incident or who he says know about the incident. He named, specifically, certain family members, including his mother. Yet, he did not provide any statements from any people who had knowledge of this incident. No one corroborated his claim. The incident is serious because this is really the only one that involves the police authorities of Russia themselves rather than Cossacks or private individuals. And yet, he provided no statement or affidavit or letter or live witness of any persons who could corroborate it. I do not make any adverse inferences over the fact that there is no police report on this incident. That is because if it occurred by the police, the respondent's explanation for a lack of a police report is reasonable: that is, he would not have felt it useful to report an incident to the police that the police themselves were involved in. However, what is not reasonable in the view of the Court is the total lack of corroboration for what seems to be in many ways the most significant claim to past persecution he experienced, and in his own words, the reason he ultimately decided to leave Russia. I also believe that there was a lack of reasonable corroboration on the respondent's conversion from atheism to the Baptist faith and his practice of that faith in Russia. In the view of the Court, there were persons, his pastor, his fellow worshipers or even his family members who could have corroborated his claim that he is a practicing Baptist, and that he experienced problems as a result of his faith. Since the basis of his claim, the

heart of his claim, is religion, one would have expected more proof on his conversion and practice of that religion. There seems to be reasonably available corroboration which was not produced on this issue. Turning now to analysis of the claim of a well-founded fear of future persecution, I make the following findings. In the absence of past persecution, to be eligible for asylum, the respondent must demonstrate a well-founded fear of future persecution should he return to Russia. Based upon the totality of the evidence, I find that the respondent has not met his burden of demonstrating an objectively reasonable fear of future persecution. As indicated in the analysis of past persecution or alleged past persecution, the respondent has not shown that at least some of what happened to him was on account of his religion. He has also not shown that what happened to him was by persons that the government of Russia was unwilling or unable to control or by the government itself. It is clear to the Court that the Cossacks are responsible for some abuses against minorities and even practitioners of some minority religions in Russia. There is significant information in the record of proceeding to establish that. But there is also record evidence, including the State Department Human Rights Report and the International Religious Freedom Report for Russia, which suggests that Baptists in present-day Russia, while they may experience some isolated discrimination, do not or are not persecuted in that country either by the government or by the Cossacks or by any other persons the government is unwilling or unable to control. In short, I believe that the respondent could return to Russia and practice his faith as a Baptist without experiencing persecution. I note that while he testified that he believes Cossacks are all over Russia, in the absence of past persecution

and when the alleged persecution is not by the government itself, the burden is on the respondent to show that it would not be reasonable for him to relocate in Russia where he could avoid problems and practice his faith. In the view of the Court, he has not done so. See 8 C.F.R. 1208.13. Thus, I must deny his application for asylum for failure to establish either past persecution or a well-founded fear of future persecution. Turning now to withholding of removal under INA Section 241(b) (3), I find the following. Since the respondent has failed to meet his burden to show eligibility for asylum, he necessarily has also failed to meet the higher burden for withholding of removal. Thus, the respondent's application for withholding of removal pursuant to the INA will be denied. Turning now to his claim of withholding of removal pursuant to the Convention against Torture, I find the following. I do not believe that there is any indication that he would have any reasonable chance at all of facing torture should he return to Russia. What he experienced in the past, while wrong and regrettable, does not come close to torture in the view of the Court. Certainly, he has not met the high burden of establishing that torture would be more likely than not should he be returned to that country. I recognize there is no nexus requirement. He does not need to show that he would be tortured because he was a Baptist or on account of any other ground, but he has not shown that he would be at any risk of torture for any reason should he return to Russia today. Thus, I must deny his claim for withholding of removal pursuant to the CAT.

ORDERS OF THE COURT

Accordingly, the following the orders are entered.

Respondent's application for asylum is denied.

The respondent's application for withholding of removal pursuant to the INA is denied.

The respondent's application for withholding of removal pursuant to the Convention against Torture is denied.

The respondent shall be removed from the United States to Russia on the charges contained in the Notice to Appear.

/s/Thomas G. Snow
THOMAS G. SNOW
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE THOMAS G. SNOW, in the matter of:

SERGEY FISENKO
A 98 814 305
Cincinnati, Ohio

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/Caliope K. Farber
Caliope K. Farber, Transcriber

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July 11, 2007
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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4089

[Filed November 12, 2009]

SERGEY FISENKO,	)
	)
Petitioner,	)
	)
v.	)
	)
ERIC H. HOLDER, JR., ATTORNEY GENERAL,	)
	)
Respondents.	)
	)

ORDER

BEFORE: COLE and ROGERS, Circuit Judges; and GRAHAM,* Senior District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the

* Hon. James L. Graham, Senior United States Senior District Judge for the Southern District of Ohio, sitting by designation.

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4089

[Dated June 18, 209]

Sergey Fisenko,	)
	)
Petitioner,	)
	)
Erick H. Holder, Jr.,	)
	)
Respondent.	)
	)

- - -

TRANSCRIPT OF RECORDING

OF ORAL ARGUMENT PROCEEDINGS

BEFORE HONORABLE R. GUY COLE, JR.,
HONORABLE JOHN M. ROGERS,
AND HONORABLE JAMES L. GRAHAM

ON JUNE 18, 2009

- - -

TRACI E. PEOPLES
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On behalf of Respondent.

- - -

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(By Ms. Glauner)

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ORAL ARGUMENTS

- - -

MR. MUCHNICKI: May it please the Court, I'd like to reserve three minutes for rebuttal; and Mr. Fisenko is sitting there in the back row.

APPELLATE JUDGE: Okay. You may proceed.

MR. MUCHNICKI: Now, based upon my experience with this Court, this Court is always very, very familiar with the record, so I'd like to dispense with the factual summary and just get right to the merits of the issues.

And I submit that the issue in this case is whether the corroboration requirement can be used as a "gotcha" mechanism to justify the denial of an otherwise clearly meritorious asylum claim.

And the reason that I characterize the issue in that manner is as follows: When you -- let's look at what the evidence that Mr. Fisenko submitted is.

First of all, his own testimony was called by the Immigration Judge clear, detailed, consistent, plausible and credible. So his testimony established it. He supported that [p.5] testimony with police reports for four of the six incidents for which he was assaulted or attacked. In addition, he provided two medical reports documenting two of his most severe beatings, which reported that he received concussions and bruised kidneys as some of the results.

APPELLATE JUDGE: Counsel, those police reports documented the fact some bad things had happened to him; but they didn't document any reason or motivation for them.

MR. MUCHNICKI: Actually, you've jumped ahead; but, yes, they do. I was going to bring it up at the end. This was something that was missed in the record. And I submit that if you look at --

APPELLATE JUDGE: What do you mean it was missed in the record?

MR. MUCHNICKI: In the police reports, the police reports note the attacks were because he was a Baptist. And let me -- on Page 388 of the Appendix is the first police report -- one of the police reports notes that Mr. Fisenko said that he was attacked because of his religious beliefs.

Now, okay. You say that doesn't establish what his beliefs are; but if you then look [p.6] at the police

report at Page 399 of the Appendix, it's referred to that he was attacked because he was a sectarian.

Now, on the record, sectarian was a slang -- it's been established that that's a slang in Russian for a Baptist, a sect member. So it's in the police report he was attacked for being a sectarian.

And then, I think conclusively, if you look at Pages 404 to 405, you have the police report of the boy who smashed his car. And the boy says he went after him because he was a sectarian. And that boy was the son of one of the Cossack officers from the earlier incident. So the police records say that the guy who attacked him said, "I went after him -- I threw the rocks at his car because he's a sectarian," which is a Baptist. So there actually is corroboration in the records.

APPELLATE JUDGE: Where is it established in the record that this reference to "sectarian"universally means Baptist?

MR. MUCHNICKI: There -- I do refer to it in the factual part of my brief, but there is a statement -- Mr. Fisenko did testify that sectarian [p.7] is a reference to Baptist or -- sectant, sectarian, are references to Baptist, as well as the fact that Mr. Fisenko's own testimony was, "The guy came after me because I'm a Baptist." So it does corroborate that. So either reason -- plus when we find out that --

APPELLATE JUDGE: He said that he was a Baptist in Russia?

MR. MUCHNICKI: Yes. And that's the key point. These are -- Now, the Judge found that these reports

were sufficiently credible to establish that the police took action. Well, why aren't they sufficiently credible to establish the police took action in cases where he was assaulted because he was sectarian? And the answer to that is there is no justification for disregarding that.

APPELLATE JUDGE: But, of course, the police did take the report, they did investigate. So the State is addressing his complaint of persecution.

MR. MUCHNICKI: Well, again, Mr. Fisenko said they didn't investigate; this is routine stuff. But, second, the standard is whether the government is unwilling or unable. And if you look at the -- [p.8] unwilling or unable to control private action. And if you look at the U.S. Department of State Religious Freedom Report for Russia, and this is quoted in my brief, the State Department says specifically no cases have ever been prosecuted, that they occasionally investigate, but they have never prosecuted.

So when we look at that, there is, of course, the general requirement that the Court must interpret the evidence in light of country conditions -- well, the country conditions information, according to the United States Department of State. And their Religious Freedom Annual Report is the government doesn't -- has not been able to prosecute anyone for assaults on Baptists or any other religious minorities. So that's all in the record.

So, in addition, we also have -- like I said, we have the two reports from -- the medical reports confirming two of his beatings. We have an affidavit from another person who now lives in the United States, Ms.

Shetsova, who is from the same town as him. And her family and they were from -- they fled Krasnador because they were Baptist, and [p.9] they were granted asylum by the United States Immigration and Naturalization Service. So that confirms that this happens in that region.

We have a letter from his current pastor that he is a current practicing Baptist. And then we have hundreds --

APPELLATE JUDGE: Did he submit any evidence from the folks in Russia as to when he became a Baptist and that he was a member of a Baptist congregation there?

MR. MUCHNICKI: No, he didn't. No, he didn't.

APPELLATE JUDGE: Why not?

MR. MUCHNICKI: Well, that's the question. We don't know, because if you look at -- as I point out in my reply brief, his response to that question is garbled. And there was no effort made by the Immigration Judge -- the Immigration Judge said, "Well, your answer isn't even clear." But the Immigration Judge made no effort to get a clarification on it, whether it was to ask the translator to redo it or to re-ask the question.

So, in fact -- so what I'm trying to point out is there is a huge ocean of evidence in [p.10] this case. And the case has to be evaluated by what's in the record, not what's not. Both of them look at the one document that is not in the record. Then if that is the critical issue, the Judge had an obligation, as part of his inquiry, to

ask Mr. Fisenko to clarify what his answer was. I mean, the answer is garbled. I don't think that can be seriously disputed. There is no coherent answer there.

But beyond that, the practicality of this whole corroboration issue is, do you want to know what defines corroboration? It's the lawyer who prepares the case. These people coming from these other countries, they don't know what corroboration is. They don't understand the requirements of 8 C.F.R. Part 1200 for rules governing the immigration court. The person who guides them through these cases is the attorney.

Now, I've done a lot of Russian Baptist cases; and, yes, in every one of mine, I make sure I have something. I tell the client, "Go get something from Russia to make sure you can prove you're a Baptist back there." The lawyer in this case may not have.

[p.11] But, you know, the original corroboration doctrine was developed in the case, Matter of S-M-J, which was ultimately reversed by the Second Circuit in Diallo v. INS. But that was a Mauritanian case, where the guy had no corroboration at all.

And in that case the BIA, not unreasonably, said, "Look, you've got to have something. You can't walk in here with just nothing." And that certainly is a reasonable approach; but that's been taken from a starting point of you've got to have corroboration, to now, we're going to ignore all the corroboration you have and only focus on the one thing you don't have. That's where it becomes a "gotcha" mechanism.

And I submit no reasonable fact finder, when you take the consistent credible evidence -- the four arrest

warrants, three of which referred to his religious -- to him being beaten for religious purposes; the two hospital records; the letter from his current pastor; the affidavit from the current person who is now in the U.S. as an asylee, who was from the same town, that she was persecuted for her religious beliefs; and the ocean of documents from the United States Department of State that say that [p.12] religious persecution is rampant in Russia for a non-Russian Orthodox church, it is a cauldron of hatred burning there now -- when you pull all that together and you say, "Well, I'm going to deny it because he didn't get a letter from his pastor," that is not reasonable. And that turns the corroboration requirement into a "gotcha" mechanism.

But because now, in fact, this hearing -- this corroboration issue is turning asylum law into something different than any other area of the law. I don't know of anywhere else where the law goes on what's not in the record, rather than what's in the record. Yet that's how these cases --

APPELLATE JUDGE: The reason, obviously, is that when people come from foreign countries and one sort of narrative warrants asylum, that goes to -- and I'm not talking about Russian Baptists necessarily, but just sort of generally speaking -- then that narrative becomes the narrative of a lot of people who also want to stay. And the system needs something to corroborate that this person hasn't just picked up a narrative that worked for his uncle or his cousin two months ago.

MR. MUCHNICKI: I agree --

[p.13] APPELLATE JUDGE: So you can say there's no other area of the law where it exists; but arguably, there's no area of the law where it's needed as it is in the immigration area unless you're just going to say everybody can say, "I was hurt the same way somebody who was admitted was hurt."

MR. MUCHNICKI: I agree with you. That's why the corroboration requirement, taken in the outset, is a reasonable requirement. But when you apply --

APPELLATE JUDGE: You seem to be saying it's not a reasonable requirement, because it's relying on the absence of a document instead of the presence of a document. That's -- what a corroboration requirement is, is relying on the absence of something rather than the presence of something.

MR. MUCHNICKI: No. I'm saying where the guy did corroborate it, as he did in this case. He has abundant corroborating evidence. I mean, that's why I said S-M-J was a case where they had no documentation of any kind. And I understand. And I think it's entirely appropriate to say wait a [p.14] minute. We're not going to do this. You just can't have people coming in and saying whatever they want. But we've gone from S-M-J, where there was no documentation, to now a case here where the guy has four police reports, two medical certifications concerning he was beaten up, a letter from his current pastor, an affidavit --

APPELLATE JUDGE: -- that goes directly towards the government suppressing him because he's Baptist, as this last one, for which there's no corroboration.

MR. MUCHNICKI: And is there any realistic -- and no one has suggested -- the BIA's decision never --

APPELLATE JUDGE: I'm just asking --

MR. MUCHNICKI: How are you going to get corroboration from the police that they beat you? I mean, that's why -- that's why the documentation -- Well, there are numerous cases that suggest that there are limits on the corroboration requirement because of that.

APPELLATE JUDGE: As I see it, there are two problems with corroboration in this case.

Number one is lack of corroboration that [p.15] he was, in fact, a Baptist in Russia.

And number two is corroboration of the most serious alleged act of persecution; and that's the incident involving the invasion of his house; the hanging of his dog, and so forth. And he acknowledged that his family was well aware of this, and his neighbors were well aware of this, but there is no corroboration of that, which is the most severe.

And the others standing alone may not be enough to establish a pattern of persecution. So I'd like for you to address this issue regarding the most serious event and the lack of corroboration for it.

MR. MUCHNICKI: May I? But first of all, actually the BIA decision does not rely on that incident. It only relies on the failure to obtain the letter from the pastor. The BIA decision is quite specific.

APPELLATE JUDGE: Do you agree there was no corroboration of this really serious alleged act of persecution?

MR. MUCHNICKI: Right. There wasn't.

APPELLATE JUDGE: Why not?

[p.16] MR. MUCHNICKI: Well, again, I think the -- Why not? Because my view would be because probably the lawyer didn't say, go get it. But it's interesting to note that -- I was here last week in the case of [inaudible] v. INS --

APPELLATE JUDGE: Let's talk about this case.

MR. MUCHNICKI: I know, but it's the same exact issue. In that case -- with the same exact Immigration Judge by the way. In that case, where the person produced affidavits from his wife and three friends, the Immigration Judge dismissed them, saying that those are people interested in the proceeding; and therefore, there is no weight entitled to their affidavits. So you've got this yin and yang -- and that's the same Judge as in this case.

And in the one last week where there weren't any -- or there were letters from the friends and relatives, he said it's not entitled to any weight. And now when there isn't, now all of a sudden it's important.

But the BIA -- and I think the BIA, itself, in its decision did not go off on that [p.17] point. The only thing that could have --

APPELLATE JUDGE: The BIA did adopt the decision of the lower Judge.

MR. MUCHNICKI: On the issue -- the BIA was specific on the issue of failure to get a letter proving he was a Baptist.

APPELLATE JUDGE: The first sentence says: "We adopt the decision of the Immigration Judge."

MR. MUCHNICKI: Yeah; but if you read the last sentence, it says: "We support the adverse credibility decision on the basis of the fact that he didn't prove he was a Baptist."

And as I pointed out, in fact, three of the police reports do show -- do refer to him being a Baptist as the reason for his attacks. So it is corroborated there.

And even if you produce -- Again, it's kind of like what the same Judge said last week. You get a letter from the parents saying this happened, what does that prove? He couldn't get a letter -- he's not going to get a letter from the police. We know that. They're not going to say, "Yeah, we beat him up." And so he gets a letter [p.18] from his mother saying it happened. In my experience, that stuff is very seldom given much weight because it's self-serving from a family member. There is simply a limitation on it.

And let's look at what -- and, again, I submit that the issue is what did he present? And did he present a credible case? Not what he didn't present. And so when we look at the reasonable mistrust of corroboration, we should go on the reasonableness based on the totality

of the record, not on whether we can find something that his lawyers missed.

And there I submit -- and I reserve my time for rebuttal -- that that should be the test.

APPELLATE JUDGE: Your initial time has expired. We spent a great deal of time on the corroboration issue, a little bit of time on the well-founded fear of future persecution.

What's your strongest argument that Mr. Fisenko has, both as a subjective and objective basis, for having a fear of future persecution if he were to return to any part of Russia?

MR. MUCHNICKI: The State Department Religious Freedom Report itself, which says that [p.19] it's rampant throughout Russia. It goes --

APPELLATE JUDGE: It said that there is violence against or discrimination against Russian Baptists?

MR. MUCHNICKI: Actually, it says against all non-Russian Orthodox Christians, all religious groups other than Russian Orthodox. And that is in the Religious Freedom Report. It says it's a rampant problem throughout all of Russia. So it really extends beyond Baptist. It actually mentions Roman Catholics. It's basically anybody who is not Russian Orthodox.

And as the report explains, since the fall of the Soviet Union, there's been a rise in Russian nationalism. And part of that Russian nationalism has been a fanatical support for the Russian Orthodox church and viewing even other forms of Christianity

that undercut the Orthodox church as being the work of foreigners attempting to undercut Russian culture.

APPELLATE JUDGE: And the report is clear in saying that there is rampant violence against Russian Baptists and other --

MR. MUCHNICKI: Minorities? Yes, it is. [p.20] I refer you to --

APPELLATE JUDGE: And that law enforcement authorities are not able to provide protection?

MR. MUCHNICKI: Yeah. I review that in my brief. And as a result, we think that that's established. I will yield to my colleague.

MS. GLAUNER: May it please the Court, my name is Lindsay Glauner; and I represent the government. This Court should deny the instant petition for review because petitioners failed to demonstrate that the record compels the conclusion that he is eligible for asylum for three primary reasons.

First, petitioner waived any challenge to the agency's dispositive finding that five of his six past incidents of mistreatment did not rise to the level of persecution.

Second, with respect to the remaining incident of mistreatment, the most horrible, as petitioner refers to in his brief, incident of mistreatment, he failed to submit any evidence to corroborate this incident or his alleged conversion to and practice of the Baptist religion in Russia.

[p.21] Finally --

APPELLATE JUDGE: Well, he does now argue that there is corroboration that he was a Baptist in Russia because there's police reports that refer to him as a Baptist.

MS. GLAUNER: The police report that he's speaking of referred to his claim that -- his belief that the -- I think the example he gave was that the two boys who threw the stones at his car did so because he was a Baptist. So all of the police reports that he's referring to --

APPELLATE JUDGE: Isn't that corroboration that he thought of himself as a Baptist when he was over there?

MS. GLAUNER: I think that he --

APPELLATE JUDGE: Why would the police report say that if he didn't say, "They were throwing stones at me because I'm a Baptist"?

MS. GLAUNER: Correct. The police reports do indicate that he believed that what happened to him happened to him because he was a Baptist. I think --

APPELLATE JUDGE: Why isn't that corroboration of his claim that in Russia he was a [p.22] Baptist?

MS. GLAUNER: I think that the agency was looking for something more specific regarding --

APPELLATE JUDGE: How specific do you need? If he's over there -- if there's evidence that when he was over there he was telling people, "I'm a Baptist" --

MS. GLAUNER: I think that the police report --

APPELLATE JUDGE: Do you need him spotted in church? I mean --

MS. GLAUNER: I think that the police report was based on the petitioner's testimony, which the Board and this Court have found that if the petitioner's testimony is credible, the agency can still require additional corroboration where it's reasonable to do so.

APPELLATE JUDGE: But the issue is whether he claims he's a Baptist when he's in Russia. That's the issue, right?

MS. GLAUNER: Correct.

APPELLATE JUDGE: The police report is saying he claims he's a Baptist. Why isn't that corroboration of the question over whether he claims [p.23] he's a Baptist when he's in Russia? That's the issue. You can't say, well, it's self-serving because he's claiming it. The issue is whether he's claiming it.

MS. GLAUNER: Correct. I agree with you that the police reports do indicate that he believed that he was a Baptist in Russia. Correct.

I think that the agency was looking for an affidavit, a letter or a statement from someone who knew him while he practiced the Baptist religion in Russia, so something beyond just his claim that he was a Baptist,

which, as this Court recognized in Dorosh v. Gonzales, the Court can require corroboration where that fact is material to the Petitioner's claim and his religion is the basis of his claim of past persecution.

And, for example, the other incident, the incident that he has referred to as the most horrible incident, he admitted his mother, his sister and his grandmother were all aware of that incident.

APPELLATE JUDGE: What about your opposing counsel's argument that if he had gotten that, it would have been disregarded by the same IJ? [p.24] How do you respond to that?

MS. GLAUNER: I would note that Petitioner's -- I mean counsel's testimony about how the Immigration Judge handles the proceedings is not evidence, one; and also that it's extra record evidence and this Court --

APPELLATE JUDGE: Okay. He's, in a way, embracing a legal point that it's not evidence that would be of much use; and, therefore, it's not fair to penalize him for not bringing it in.

MS. GLAUNER: But --

APPELLATE JUDGE: That's the underlying -- it's sort of a colorful way of his making that argument.

MS. GLAUNER: I think that counsel's statement -- I'm sorry. I think that counsel's statement is contradicted by the fact that in this case the Immigration Judge explicitly wanted corroboration of the facts of these claims. So I think that although

maybe in other cases and different factual situations he doesn't require that corroboration, it doesn't mean that in this case the evidence was not required.

I think the found case is very -- we have [p.25] no idea what sort of corroboration those petitioners put forth in their cases and how this case may have differed. With respect to the incident involving -- the June, 2004, incident, as I was mentioning, he does testify that he could have submitted corroboration from his relatives; and he failed to do so.

So the record doesn't compel the conclusion that either the evidence regarding his conversion to -- or practice of Baptist religion in Russia or his -- the June, 2004, encounter were unavailable to him in Russia.

With respect to the remaining five incidents of mistreatment that petitioner allegedly suffered in Russia, petitioner waived any challenge to the agency's finding that these five incidents were not sufficiently severe to rise to the level of persecution; but, as a result, it's impossible for petitioner to demonstrate that these five incidents constitute past persecution.

If this Court finds that waiver does not apply in this instance, it's clear from the record that these five incidents do not constitute past persecution, because they were neither sufficiently [p.26] severe or were not committed by the government or a group that the government was unable or unwilling to control. These five incidents were limited to -- they were all isolated and random from one another, if you will. They were carried out by different groups of people.

And the harm that the petitioner suffered during these incidents was, apart from one occasion, limited to a few punches or a push; and on only one incident did petitioner suffer any sort of injury. And that was fixed by what appears to be a shot of some sort of painkiller.

These incidents were also not committed by a group that the government was unable or unwilling to control. Contrary to petitioner's arguments on appeal, it is clear that the Russian Constitution provides for freedom of religion and that the government generally respects that right. There is evidence in the United States -- in the 2005 State Department Report and the 2005 International Religious Freedom Report and also a Human Rights First report that all indicate that the police do -- the authorities do investigate religious discrimination and violence and that they [p.27] have prosecuted some of those incidents.

It does indicate that prosecution and arrests are not -- I forget the exact words that they used -- common or usual or routine, but that they are -- they do occur with some frequency.

And the country of Russia recently adopted a hate crimes law, and there is evidence in the record that they are prosecuting people for violence against religious minorities under that hate crime as well.

Finally, with respect to petitioner's fear of future persecution, petitioner again waived any challenge to the agency's conclusion that his fear was not objectively reasonable or that it would be unreasonable for him to relocate in Russia. As a result, it's

impossible for him to demonstrate that he has a well-founded fear of future persecution in Russia.

However, if this Court finds that the waiver does not apply, the record demonstrates that petitioner failed to demonstrate an objectively reasonable fear of future persecution, because there is no evidence in the record that the government, the Cossacks or anyone else would single him out for [p.28] persecution in the future on account of his religion.

APPELLATE JUDGE: What about these country reports that counsel has cited about rampant violence against Russia Baptists all over Russia and that the authorities are unwilling or unable to provide any protection?

MS. GLAUNER: In the appendix, there is only one instance in which a Baptist was either -- ever physically attacked. It occurred in some church in which a woman was stabbed. It did not indicate the cause of the incident. That's the only one incident that I was able to see that there was any sort of physical altercation involving a Baptist.

There are instances in which -- there's three instances in which Baptist churches have been firebombed. Two of those churches were unregistered, and one was a registered church. And there's evidence in the record that members of unregistered Baptist churches do seem to have more trouble than members of a registered Baptist church, which petitioner was.

He testified on Page 72 -- 87 of the [p.29] appendix that he was a member of a registered Baptist church, which distinguishes his case from the affidavit, which

the petitioner submitted in support of his claim, of the woman who was granted asylum in the U.S. from the same region that he's from in Russia, because she was part of an unregistered Baptist church.

APPELLATE JUDGE: All right. I'm not familiar with other countries. Is -- A registered church, as opposed to an unregistered church, is that, like, illegal to have an unregistered church?

MS. GLAUNER: Yes. The country of Russia requires all religions to be registered, all religious groups to be registered, I guess.

APPELLATE JUDGE: Is it like one official Baptist church, or is it like getting a license?

MS. GLAUNER: It's like getting a license. There are over 100 registered Baptist churches in Russia, so it seems like, yes, similar to getting a license. But you still can apply to get the licenses, and they seem to be still giving them.

Now, with respect to the second issue of petitioner's fear of future persecution, he failed [p.30] to demonstrate that it would be unreasonable for him to relocate within Russia. He -- his only evidence that it would be unreasonable for him to relocate was his claim that this Cossack group is located all over the country. However, there is no evidence in the record that this group is -- that their mission is to attack Baptists or that they have a Russia-wide network of anti-Baptists or anything along those lines.

And, again, the Russian government is not only investigating, as they did in this case, instances of

religious violence and discrimination, they are prosecuting those instances. Based on this, there is -- and if there's no further questions, I'll basically conclude.

The record simply does not compel the conclusion that petitioner is eligible for asylum. Therefore, this Court should deny the instant petition for review.

APPELLATE JUDGE: Thank you.

MR. MUCHNICKI: Just to make it clear on the record, Page 6 of the appendix in Case No. 083394 is where this same Judge dismissed affidavits from the family members as not -- as [p.31] being self-serving and not entitled to weight. So it's in the record of this Court.

Now, one of the things that I find interesting, and which there's no support for what was submitted by my colleague, is that the corroboration rule allows the BIA to choose which type of corroboration. In other words, well, we did produce corroboration in the form of police reports; but they would prefer a letter.

There is not one case anywhere in the United States that says when you submit corroboration, the BIA can say, "No. We want a different kind." So this idea of, well, we would prefer a letter, that doesn't do it. The rule is to corroborate; and if he corroborated it through the police reports, that's corroboration.

Now --

APPELLATE JUDGE: That goes to whether he considered himself a Baptist in Russia, but it doesn't

really -- that comment doesn't really go to whether there's corroboration for the most horrible incident.

MR. MUCHNICKI: No. And as I said, the only thing -- everyone -- and I submit on that [p.32] point, the case law -- could they get corroboration on the police beating him up from the police? The answer is no. The only thing he could produce --

APPELLATE JUDGE: I understand.

MR. MUCHNICKI: Okay.

APPELLATE JUDGE: Could you address this registered versus unregistered? You said you had a lot of these Russian Baptist cases.

MR. MUCHNICKI: Yes.

APPELLATE JUDGE: What is the meaning of registered versus unregistered?

MR. MUCHNICKI: The way that the Russian government has control of the Baptist religion is it requires churches to register. And if they don't, they declare the specific churches illegal. When the churches register, they are required to turn over their membership lists of everyone. So churches that refuse --

APPELLATE JUDGE: There is no indication in the record that he had some religious reason for refusing to be in a registered church that he would only --

MR. MUCHNICKI: There's no discussion of whether he's registered or unregistered; but what is

[p.33] in the record -- and, again, I would ask the Court to address -- look at Pages 22 through 25 of my merit brief, which reviews all of the country conditions information.

For example, in the Department of State report, it says: "Societal discrimination, harassment and violence against members of religious minorities is one of the most significant human rights problems in Russia."

APPELLATE JUDGE: Societal.

MR. MUCHNICKI: What?

APPELLATE JUDGE: Societal.

MR. MUCHNICKI: Yes.

APPELLATE JUDGE: All right. What about government-sponsored or government's participation or government's failure to be able to protect --

MR. MUCHNICKI: On the next page --

APPELLATE JUDGE: All right.

MR. MUCHNICKI: Again, I'm on Page 323.

APPELLATE JUDGE: Page 323?

MR. MUCHNICKI: Page 23 of my merit brief. I quote the State Department, a specific quote, which is: "Authorities usually investigated incidents of religious vandalism and violence, but [p.34] arrests of suspects were extremely infrequent and convictions are rare."

So it is established that they had not been able to control that.

And so I submit when you put together the totality of the evidence in this case, no reasonable fact finder could reject the claim that has been submitted; and he has established that he is a Baptist.

The remedy we seek, based upon the BIA decision -- the BIA decision specifically says it agrees with the adverse credibility finding because he didn't prove he was a Baptist. So if that is reversed, then the adverse credibility finding is reversed, and you have to remand this case for a new redetermination without the adverse credibility finding.

Thank you.

APPELLATE JUDGE: Okay. Thank you Counsel, for your arguments today.

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And, thereupon, the arguments were concluded.

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[p.35] C-E-R-T-I-F-I-C-A-T-E

I do hereby certify that the foregoing is a true, correct and complete written transcript of the audiotaped proceedings in this matter, reduced by me into stenotypy, to the best of my ability, and transcribed from my stenographic notes on the 18th day of January, 2010.

Traci E. Peoples
Notary Public in and for
the State of Ohio and
Professional Reporter.

My commission expires July 15, 2014.

APPENDIX F

8 U.S.C. §1101(a)(42)(A)

8 U.S.C. § 1101. Definitions

(a) As used in this chapter–

* * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a

particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1158(b)(1)

8 U.S.C. § 1158. Asylum

* * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or

witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.